ERRATA

In the Printed Record.

In examining the printed record for the preparation of the brief for defendant in error, we discovered an error in a material date in, and a serious omission of important words from, defendant's "Exhibit C" (fol. 24-6), as reproduced in the printed record. From this "Exhibit C," as it appears in the printed record, there is omitted immediately after the words "telegraph lines" in line 6 of said exhibit, the following words: "and also for the repair of that portion of its railway and telegraph line."

The first paragraph of said "Exhibit C" should read as follows:

> "Whereas, by certain Acts of Congress of the United States, The Denver & Rio Grande Railroad Company, in its own right, and as the successor of The Denver & Rio Grande Railway Company, is authorized to take from the public lands adjacent to its line of railway, stone, timber, earth, water and other material required for construction of its railway and telegraph line; *and also for the repair of that portion of its railway and telegraph lines* constructed prior to the 8th day of June, 1882."

In line 10 of the same exhibit, we find "1883," an erroneous date, which correctly is, and should appear as, "1882."

We are not yet aware whether these errors crept in at the preparation of the transcript of the record by the clerk of the New Mexico Supreme Court, or whether they are—as they might easily be, owing to the appearance of the same words "telegraph line" in two places—an oversight by the compositor in setting up the printed transcript. We have put ourselves in communication with the clerk of the New Mexico Supreme Court, and also with the clerk of this Honorable Court for the purpose of ascertaining where these errors were made, and of having them properly corrected; and we have no doubt but that, by the time the case is reached for final hearing before this Honorable Court, the record will be corrected so as to accurately present defendant's "Exhibit C," as introduced in evidence at the trial, and as of record with the files in this cause.

Meanwhile we take this method—the only one now open to us—of calling the Court's attention to these errors in the printed record, since they in an important degree directly affect the subject of the action herein.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1902.

THE UNITED STATES, *Plaintiff in Error,* v. THE DENVER AND RIO GRANDE RAILROAD COMPANY, *Defendant in Error.*	*Error to the Supreme Court of New Mexico.*

BRIEF FOR DEFENDANT IN ERROR.

The condition of the printed record here (which we assume to be an exact reproduction of the original record on file with the Clerk of this Court) leaves us at somewhat a disadvantage in preparing the printed argument for defendant in error. It affords us no direct or certain information or suggestion as what are the errors upon

* [Wherever italics are used in this brief they may be considered our own unless otherwise stated.]

which the plaintiff in error relies for a reversal of the judgment herein, or what points and contentions will be urged before this Honorable Court in support of this writ of error. The printed record *does not contain* any *assignment of errors* as required by Sec. 997 of the U. S. Rev. Stat., and we have not yet received, and presumably will not receive in time to make printed answer thereto, the brief for plaintiff in error so as to enable us to ascertain whether it contains a *statement of errors*, as provided for in Rule 21 of this Court, and to be informed thereby what errors will be assigned and what contentions made in support of this writ.

The situation is further obscured by the fact that the record before us does not show any *exception to the judgment* of the New Mexico Supreme Court, nor any *prayer for the reversal* of that judgment, nor any *petition for a writ of error* herein.

These irregularities, omissions and defects of the record are of such character that, it seems to us, it does not sufficiently present a case for review, and does not require this Court to give the case any consideration other than to dismiss the writ and affirm the judgment. There is, furthermore, to our minds, a serious doubt whether a record, disclosing the absence of such fundamental essentials to review, presents such a case as will, under the rules of appellate procedure, permit or authorize the consideration of this writ of error upon the merits by this Honorable Court, even if it should be inclined to overlook the omission of these essentials and examine the case to ascertain

for itself whether there are any such errors therein as demand a reversal of this case.

However, as we read Rule 21 and the decisions of this Honorable Court which have come under our notice construing said rule, it seemed to us exceedingly doubtful whether a motion to dismiss would be proper and available, inasmuch as this Court is vested with so broad a discretion in giving consideration to cases presented to it, notwithstanding radical defects and omissions in the procedure by which the particular case is brought up.

We have, therefore, concluded that a proper course here—and perhaps the only proper course—would be to refrain from filing a motion to dismiss and, after calling the Court's attention to the foregoing facts, to leave the question of the regularity and sufficiency of the proceedings incident to perfecting this writ of error for such consideration and determination at the final hearing as this Honorable Court may deem meet and proper in the premises.

Under this condition of the record, we, in the preparation of our printed argument for the defendant in error, are placed in a position where we must *guess* at the points which will be raised and the contentions which will be made in support of this writ of error, and are, therefore, under the necessity of being guided solely by the contentions made in the New Mexico courts, and compelled to discuss all of those contentions, although we believe that many of them will not be urged before this Honorable Court, and that if we had before us an assignment of errors as required by said Sec-

tion 997 of the U. S. R. Stat., and by Rule 21 of this Court, our argument on behalf of the defendant in error might be very much abbreviated and many of the points, which we are now compelled to consider and discuss, eliminated.

Taking then as our guide, for want of a better one, the assignment of errors upon which this case went up from the *nisi prius* court to the Territorial Supreme Court, the first question raised, and, as we understand it, the one most relied upon, by the plaintiff in error in the New Mexico Supreme Court, is the following:—

I.

Is the Act of June 8, 1872, Void for Uncertainty?

In answer to this, defendant in error relies upon the following propositions, to wit:

(1) *This point is one which is no longer open for discussion.*

This statute (17 U. S. Stats. at Large, p. 339) has been repeatedly before the various federal courts from the Supreme Court down to the district courts in cases between the *same parties*, predicated upon the *same cause of action* although in some instances *the subject of the action* in the particular cases, while similar, has been not identical with that here involved. The statute has in all of those cases been considered and adjudged to be a "solemn grant" *inter partes* for valuable consideration. It has been so considered and acted upon by each of these parties, as well by the United States as by this defendant in error; by the courts,

federal and territorial, the Department of the Interior throughout all of its subdivisions having any control over or connection with the question, by the state and territorial courts, and by this railroad company, its officers, agents, and representatives, from 1872 down to September 14, 1900, without any contention, suggestion or intimation that said statute was in this, or any other particular, invalid, void or inoperative.

U. S. v. *D. & R. G. R. Co.*, 150 U. S., 1;
Bacheldor v. *U. S.*, 83 Fed., 986;
D. & R. G. R. Co. v. *U. S.*, 34 Fed., 838;
U. S. v. *D. & R. G. R. Co.*, 31 Fed., 889;
D. & R. G. R. Co. v. *U. S.*, 9 N. M., 385;
In re., Denver &c. R. Co., 8 L. D., 41, 42.

We, therefore, confidently contend that the plaintiff in error is now and has long since been completely precluded from raising any such point, or making any such contention.

(2) *The word* "adjacent," ***as used in these statutes, is not, in a legal sense, ambiguous or uncertain so as to affect the validity or sufficiency of this statute.***

The meaning and application of the word as used in this and kindred statutes has been before the courts in numerous cases and its meaning and application made the subject of judicial consideration and determination. In none of these cases has any difficulty been experienced by the courts in determining the reasonable, proper and effective meaning of the word as applied to each par-

ticular case; in giving it such an interpretation as to make the statute operative and to carry out the evident intention of Congress in passing it; and in so applying it as to give the railroad company the intended benefit and at the same time fully protect the rights and property of the United States against unreasonable and unwarranted invasion. In fact the courts have promptly and clearly recognized that Congress intentionally and intelligently selected and used the term "adjacent," in preference to words of kindred meaning, for the very purpose of giving to the statute a certain amount of elasticity so that the railroad company might thereunder receive the benefit intended to be given in return for the immense benefit conferred upon the Government, its theretofore unavailable and inaccessible public domain and resources, and upon the public at large. It has been repeatedly held by the federal courts that Congress intentionally and intelligently selected and used this particular term for the very purpose of avoiding an arbitrary, cast-iron and inflexible limitation of the rights granted by the statute and in order that, in applying it to concrete cases which might arise, such interpretation and application of it might be made as was fair, reasonable and just under the circumstances of each particular case.

In *Bacheldor* v. *United States*, 83 Fed., 987, the U. S. Cir. Ct. App. (8th Cir.), in construing the Act here under consideration, said:

> "The sole question to be considered upon this record is the meaning of the

word "adjacent" as used in the Act of Congress of June 8, 1872. * * * If Congress had intended to limit the defendant's right to take timber and other materials, for the construction of its road, to the township through which its road is located, it would most likely have so declared in plain language and thus have freed the act from all doubt and uncertainty as to its meaning. The fact that Congress did not do so when conferring the right in question, but used the word "adjacent," which is purely a relative term, and may be applied differently when applied to different objects and under different circumstances, is very persuasive evidence that Congress did not intend to fix an arbitrary line on each side of the defendant's right of way, beyond which the right to take timber and other materials should not extend. The use of the phrase "lands adjacent" to the right of way, instead of fixing a more precise limit, as might well have been done by referring to the public surveys, indicates, we think, that it was not the intention of Congress to confine the privilege in question to particular townships or sections lying along the right of way, but that its purpose was to leave the right to take timber and other materials to be governed by circumstances. Congress intended to offer substantial inducements for the con-

struction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of railroad to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the Land Department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land, from which material had been obtained, was adjacent to the right of way within the spirit and intent of the Act. * * * * *
The use of the word "adjacent" is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which timber has been obtained for the construction of a railroad is near to or remote from the right of way."

See, also, the other cases cited *supra*.

The word, "adjacent," has been also under consideration and interpreted in many other federal, and some state, cases, where it appeared in similar connections, and in arriving at the proper interpretation and effect to be given this word and the proper construction of a statute containing it, it may be interesting and instructive to examine some of the rulings and adjudications upon similar statutes in which the word appears:

Vane v. *Newcomb*, 132 U. S., 220, 235-6;
U. S. v. *Freeman*, 3 How., 556, 564-5;
23 Am. and Eng. Ency. of Law (1st ed.), 314-15.

With this in view, we respectfully call attention to the following:

Winona, &c., R. Co. v. *Barney*, 113 U. S., 618, 625;
U. S. v. *St. Anthony R. Co.*, 114 Fed., 722;
Stone v. *U. S.*, 64 Fed., 667, 673-4;
Same v. *Same*, 167 U. S., 178, 189-198;
2 Copps Land Owner, 820;
10 id., 11, Sec. 2;
Ib., p. 139, Sec. 30;
In re G. B. & L. R. Co., 1 L. D., 610;
In re Denver &c. R. Co., 8 L. D., 41, 42, 44;
Also, *Henderson* v. *Long*, 3 Tenn. (Cooke), 128;
U. S. v. *Burlington &c. R. Co.*, 98 U. S., 334, 339, 340;
Peverelly v. *People*, 3 Parker's Cr. Rep. (N. Y.), 69;
Johnson v. *D. C.*, 6 Mackey, 21.

In *U. S.* v. *N. Pac. R. R. Co.*, 29 Alb. L. J. (p. 24), Hoyt, J., said:

> "Congress then having selected from several synonymous words the one having, as applied to the subject in the section in which it is used, the broadest meaning and most extended signification of the whole, must be held to have intended the broadest rather than the more restricted signification to be given to it in the interpretation of said section. * * * And we are of opinion that timber land nearest to the line of the road must be held to be neighboring timber land, even although there may intervene large tracts of land not timbered. If this be so, then, under the facts of these cases, as above stated, the lands from which the timber in question was cut were in the neighborhood of the line of the road where it was used, and, therefore, *adjacent* thereto, within the meaning of Section 2 of the charter of the defendant Northern Pacific Railroad Company."
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> 1 *Am. & Eng. Enc. of Law* (2d ed.), 634, note.

In *U. S.* v. *Chaplin*, 31 Fed., 890, speaking upon this point, Deady, J., said:

> "Before undertaking to interpret the language of the act in this connection, it is proper to consider its general nature and purpose. And, first, the act is not a

> mere gratuity, but was evidently passed on the theory that it is for the interest of the grantor to promote the building of railways through the public domain. At its passage, the United States was, and still is, the owner of millions of acres of wild and unsettled land. Congress intended to enhance the value and promote the settlement of these lands by inducing capital to build railways through them. The inducement is the right-of-way and the license to take material from the adjacent lands for the construction of the road. * * * What is 'adjacent' land, within the meaning of the statute, must depend upon the circumstances of each particular case."

In *U. S.* v. *Lynde*, 47 Fed., 297, we find Knowles, J., after commenting upon kindred decisions, saying:

> "Considering these cases, it is evident that the adjacent land named in the charter of the Northern Pacific Railroad Company, was not intended to be land contiguous to or adjoining the line of its railroad. And it seems to be left in some doubt as to what should be considered adjacent or neighboring land to said line of said railroad. It certainly is not definitely determined. We are led to the conclusion that it must be determined by the evidence in the case."

We say, therefore, that even viewing the question on one hand as an original proposition, it can not be said that this word "adjacent" is in a legal sense ambiguous and uncertain so as to render void and ineffectual a statute in which it appears and whose sufficiency and validity depends upon it.

On the other hand, whatever might be the holding of the court upon the question, if it were now presented for the first time, this word has been so repeatedly before the courts and its meaning and application so thoroughly construed and judicially defined that it can not now be said to be ambiguous and uncertain, even if it were possible to hold that such defects inhered in the word as originally used and before its application and meaning were defined, limited and fixed by judicial and departmental interpretation, as appears by the authorities already cited.

We respectfully submit that all question as to the validity of this Act of Congress and the sufficiency of the word, "adjacent," as used therein, is, as between the parties hereto, now and forever concluded by operation of the rule of *stare decisis* as well as of the principle of *res judicata*.

In *II Black on Judgments* (1891), § 603, p. 720, it is said:

> "According to the doctrine of the best cases, a title previously passed upon, although in a suit between different parties, will not be again examined and adjudicated in a case proceeding upon the same

state of facts and presenting precisely the same question, in the absence of a showing that the former decision was manifestly erroneous. This, however, is not strictly upon the ground that the matter is *res judicata* but rather upon those settled principles which induce the courts to abide by their former decisions, that is, the rule of *stare decisis*."

See, also—

Coffey v. *U. S.*, 116 U. S., 436, 443;
Stone v. *U. S.*, 64 Fed., 667, 670–2;
Empire St. N. Co. v. *Am. S. L. Co.*, 74 Fed., 864, 868;
Bradley Mfg. Co. v. *Eagle Mfg. Co.*, 58 Fed., 721, 722.

(3) *Admissions by the plaintiff in Error.*

The validity of this statute and the sufficiency of the word "adjacent" as used therein has been so repeatedly, expressly admitted by and on behalf of the United States in controversies before the Interior Department and in actions and suits before the courts arising and prosecuted between the identical parties to the present case upon the same cause of action although differing in some cases as to the subject-matter involved, that it is now too late for the plaintiff in error to raise any such contention. By its expressed admissions heretofore, it is now estopped to deny the validity and sufficiency of this grant because of the supposed defect now urged for the first time, aft more than twenty-eight years recognition and ad-

mission of the sufficiency of this word, "adjacent," and the validity and operativeness of the statute, during which period the defendant in error relying thereon has been induced to perform all the conditions and made good all the considerations, by it to be performed and made, so as to secure to it the valuable and to it absolutely essential benefits solemnly granted in 1872 when the vast public domain, which has since been opened up and made valuable by reason of its railroad construction and operation, was practically as inaccessible and valueless to the nation and to the people generally as the reputed gold-fields in the Antartic circle.

For such admissions see, *U. S.* v. *Denver &c. R. Co.*, 150 U. S., 1, and other cases cited *supra*, at page 5; especially *Denver &c. R. Co.* v. *U. S.*, 9 N. M., 382, 388, where the fact of such admission appears in *the very case at bar*.

(4) *The Law of the Case.*

The case is here for review of a judgment of the Supreme Court of the Territory of New Mexico, made upon *a second* writ of error. We submit that the only matters which can be considered by this Honorable Court are those matters *which were before the Territorial Supreme Court on this second review*, and which were then determined by it. This court must consider the case exactly as it was presented to the New Mexico Supreme Court, and any proper and legal limitation which inhered in the case as presented to the Territorial Court upon this second writ of error still inheres in it before this Honorable Court, and

limits the scope of the review which can be now made of the judgment of the Territorial Supreme Court. The first judgment in this case was entered by the district court for the first judicial district of the Territory of New Mexico in January, 1897; that judgment was reviewed upon writ of error by the Supreme Court of New Mexico, and on August 23, 1898, the judgment was reversed and the case sent back for a new trial. (*D. & R. G. R. R. Co.* v. *The United States*, 9 New Mexico, 382). Upon the first trial in the district court and the first review in the Territorial Supreme Court, the validity and sufficiency of the Act of June 8, 1872, was conceded and admitted (9, N. M., 388) and said Supreme Court expressly held (p. 385):

> "The Railroad Company had a right, under the Acts of Congress above referred to, to cut such timber from the public lands adjacent to its line * * * * * The Act of Congress gave it such right. The right is not a mere license; it is more. It is a solemn grant given by a special Act of Congress."

Upon the first trial and review in this case the contention which we are now discussing *might have been raised* and urged with as much propriety as upon the second trial and review. The statute was then involved, and if it was for any reason invalid and void, the defendant was absolutely without right or defense in the premises, and the decision reached on the first review could not have been made. The question existed then in

the same condition and with the same controlling effect as afterwards. If there was anything in the point, there was no reason why it should not be presented upon the first trial and review; and if it had been presented and held to be good, it was a complete answer to the defense relied upon by the railroad company. This statute was necessarily involved in that trial and review, and the decision reached upon the first review could not have been reached except upon the finding that this statute was good and valid. If, therefore, the first review decided anything; if the decision of the Supreme Court of New Mexico upon the first writ of error is not mere waste paper; then it settled for all purposes in this particular case that said Act is valid, and constituted a solemn grant by Congress to the railroad company.

In *II Black on Judgments* (1891), the law is stated as follows:

§ 613, p. 736.

> "Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. 'The estoppel is not confined to the judgment,' says the Supreme Court of Massachusetts, 'but extends to all steps involved in it as necessary steps or the ground work upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the

obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion."

§ 614, p. 740.

"It is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment."

§ 615, p. 741.

"A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. In other words, it is conclusive evidence of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further."

§ 657, p. 791.

"But the trial of an action of trespass may turn upon the question of title, and if either of the parties puts his title in issue and it is tried and passed upon, the verdict and judgment in that suit will be conclusive evidence in favor of (or against) such title, at least in a subsequent action of trespass."

In *Smith* v. *Ontario*, 4 Fed., 386, the Court said (p. 390):

> "The doctrine of the estoppel becomes of very little practical value, if whenever a former adjudication is relied on the former can be distinguished from the second by some variation of the evidence. The matter at issue or point in controversy may involve a number of minor issues, and it can not be said not to have been decided because some of these minor issues were not specifically considered.

In *Semple* v. *The Bank*, 5 Sawyer, 88, the court said (p. 96):

> "But the court, even if there had been no defense interposed, must, in giving its decree, have determined that the bank had capacity to sue and that the note and mortgage were valid. This much at least was necessarily included in the decree, and without determining these two questions in this way the court could not have pronounced it.
>
> It is not necessary to say that the Circuit Court as a matter of fact actually and consciously passed upon these questions in the light and upon the grounds which they are now presented to this court. On the contrary it may be admitted that it did not, because the point—that in taking this note and mortgage the bank was a foreign corporation not authorized to

> transact business in this State—was not presented to it. But in contemplation of law the court, in determining these questions in favor of the plaintiff therein, did so as to any and all matters which the defendant *might* have alleged in objection thereto."

The principle is well expressed in *McKinney* v. *The State*, 117 Ind., 26, 28:

> "In order that there may be an end to litigation, questions which were open to dispute and were either expressly or by necessary implication decided on the first appeal of a cause will not be open for review on a second appeal, upon which only so much of the proceedings as are found to have taken place after the order remanding the cause will be considered. What precedes the mandate will be regarded as finally disposed of and no longer the subject of debate in any of the subsequent stages of the trial. (Citations.)"

And in *Forgerson* v. *Smith*, 104 Ind., 246, the principle was again formulated, in the following language (p. 247):

> "Where the questions are necessarily involved, and where the conclusion declared could not have been reached without either expressly or impliedly deciding such questions, the judgment on appeal reaches the case throughout all its subsequent stages."

See, also—

Davis v. *McCorkle*, 14 Bush (Ky.), 746, 751;
Stewart v. *Heiskel*, 86 Va., 191, 193;
Joslin v. *Cowee*, 56 N. Y., 626.

The fact that the plaintiff in error and its able and distinguished counsel did not then insist upon the invalidity and insufficiency of this statute does not in the slightest degree alter the effect of the decision upon the first writ of error. They might have raised the point then, and if they did not, they were forever precluded in this particular case, because the decision then reached was necessarily predicated upon the validity of this statute and could not have been reached or justified upon any other theory. Under such a condition of the case, the decision upon the first appeal became *the law of the case* in all future proceedings therein, and the plaintiff could never thereafter litigate in that case any question which was directly or necessarily determined in the first review. The United States and its learned counsel could not thereafter, by *a change of front*, urge a contention which was open to them upon the first trial and writ of error, and which was necessarily decided by that review.

I Van Fleet's Former Adj. (1895), § 673, p. 1316;
Bridendolph v. *Zeller*, 5 Md., 58, 65;
Ellis v. *St. Ins. Co.*, 68 Iowa, 578.

In which last case the Court said:

"Evidence which we held was wrongly excluded we are now asked virtually to hold was rightly excluded, and we are

asked to hold this, not by reason of any new fact which is put into the case, but by reason of a new legal position taken by the plaintiff's counsel. We are asked to virtually hold that the evidence was rightly excluded in contravention of our former ruling, because the plaintiff's counsel have devised a better argument for excluding it."

The Supreme Court of New Mexico itself was, upon the second writ of error, absolutely bound by the decision on the first review, and could not reopen or consider any question which was solemnly determined by it on the first review.

In *Batch* v. *Haas*, 73 Fed. 974, the U. S. Circuit Court of Appeals, 8th Circuit, said:

"It is a well-established doctrine, in the Federal Courts at least, that a second writ of error or a second appeal, in the same case, only brings up for review the proceedings of the trial court subsequent to the mandate, and that it does not authorize a reconsideration of any questions, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same. This doctrine results from the fact that the judgment rendered by an appellate court in a given case is conclusive upon the parties thereto, and that an appellate court, like a *nisi prius* court, is powerless to review or revise

its own judgments, after the lapse of the term at which they were rendered, except in cases of fraud. Another form of stating the doctrine is, that propositions of law which were considered and decided on the first appeal became the law of that particular case, and, whether right or wrong, must be adhered to on the second appeal. (Citations.)"

In *Thatcher* v. *Gottlieb*, 59 Fed., 872, the same court said (p. 873):

"The decision on the former hearing, as to the question of good faith, was, in fact, a decision that the facts reported in the former special finding would not warrant an inference of bad faith, and were insufficient in law to support such a finding. We are not disposed to recede from that position, nor could we do so, for the ruling formerly made has now become the law of the case, if the evidence on the first and last trials is substantially the same. (Citations.)"

In *Barney* v. *W. & St. P. R. Co.*, 117 U. S., 228, the U. S. Supreme Court says (p. 231):

"We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal, upon similar facts. The first decision is the law of the case, and must control its disposition."

See, also—

Elliott's Appellate Procedure (1892), § 578, p. 491;
Bridge Co. v. *Stewart*, 3 How., 413;
Tyler v. *Magwire*, 17 Wall, 253, 284;
Supervisors v. *Kennicott*, 94 U. S., 498;
Clark v. *Reith*, 106 U. S., 464;
In re Sanford &c. Co., 106 U. S., 246, 255;
Last Chance M. Co. v. *Tyler*, 157 U. S., 683, 691–2;
City of Denver v. *Barber Asphalt Co.*, 83 Fed., 1020;
Austin v. *Hamilton Co.*, 76 Fed., 208, 211.

By the State courts of last resort, also, it is so generally accepted that the prior decision is conclusive on the same question on a subsequent appeal, that in a great majority of the cases the rule is adopted, without any discussion, and a prior decision in the same case is recognized as the controlling and unimpeachable "law of the case," and as more binding, when applicable, than the rule of *stare decisis*. Consequently, we find the state courts almost universally holding that a prior decision is conclusive upon a subsequent appeal, where the same questions are presented in regard to the same evidence, or where no material change was made in the evidence. The cases in which this proposition of law is announced and acted upon are too numerous to mention in the limited space to which we desire to confine this brief. If an exhaustive examination and comparison of such decisions is desired, many of them will be found collected in the note to *Hastings* v. *Foxworthy*, 34

L. R. A., 321. We shall content ourselves with reference to only three or four of such cases as examples of the trend of the decisions.

In *West* v. *Douglas*, 154 Ill., 164, the Court say (p. 166):

> "The rule is that a decision of a case by an appellate court on the merits is final on the matters decided, and is conclusive upon the facts upon a second appeal or writ of error in the same case. The points and questions considered and decided can not again be brought before such court for review, and can not be considered except upon petition for rehearing. (Citations.) * * * And in *Green* v. *City of Springfield*, 130 Ill., 315, it was held that, after a judgment of reversal by this court and a remanding order for further proceedings in conformity with the opinion, the parties will not be allowed to present the same objections or issues as before, although in a different form; and that only as to such questions as are substantially new will the case be open for further consideration."

See, also—

Stanton v. *French*, 91 Cal., 274, 276;
Larkin v. *Burlington &c. Co.*, 91 Ia., 654, 659;
Kratz v. *R. G. W. Ry. Co.*, 32 L. R. A., 828.

It consequently, necessarily and logically follows that, as this case comes up to this Honorable

Court solely for a review of the judgment which the New Mexico Supreme Court rendered upon the second writ of error this Court takes the case in exactly the same condition in which the Supreme Court of New Mexico took it upon the second review and, therefore, this Court, like the New Mexico Supreme Court, is precluded from opening up or considering any question which was not open to the New Mexico Supreme Court when it rendered the judgment which is now here for review.

What this Court can alone consider and determine is the correctness of the judgment of the New Mexico Supreme Court *upon the case as presented to it upon the second writ of error;* and if there is any question, no matter how well taken or controlling, which was not open to the New Mexico Supreme Court in the rendition of the present judgment, then that question is not open to this Court upon this review. If the decision of the New Mexico Supreme Court upon the first review was upon any question, "the law of the case" in that court upon the second review, then this Court is in like manner limited, bound and precluded. Otherwise, we would have a condition presented where this Court might review and reverse a judgment appealed from, although, in the conditions of law and fact under which the case was presented to the court below, *the judgment rendered was absolutely correct.*

Adams Express Co. v. *Hoeing*, 88 Ky., 373, 376;

Noonan v. *Orton*, 27 Wis., 300, 310.

The point, as it is in the case at bar presented by the plaintiff in error, has some apparent novelty, and seems at first blush more or less obscure and undetermined because few if any "white horse" precedents can be produced; but, when a brief analytical consideration is given to discover the underlying principle by which the question must be controlled, its appearance of novelty vanishes, and it is disclosed as the same old question, tho' in a new garb, which has been so often before the courts and always determined adversely to the present position of plaintiff in error.

II.

The Pleadings.

The next point upon which the plaintiff in error and its counsel made some contention in their printed brief in the court below was that the pleadings in this case were not sufficient to permit the defendant in error to rely upon the Acts of June 8th, 1872, and March 1st, 1877, or to introduce them in evidence, nor to authorize the territorial courts to consider them in this case. They contended that these Acts and certain other parts of the evidence were not admissible under the *general issue*, but that the defendant should have pleaded specially.

Our answer to this contention was and is threefold, to wit: (1) The pleadings in this case are to be controlled by, and were filed in accordance with, a special statute of the Territory of New Mexico which declares such pleadings "shall be sufficient;"

(2) The question of the sufficiency of the pleadings was so involved in the first review herein that it was concluded by the decision upon that review and was not a question which was open to the New Mexico Supreme Court upon the second review; therefore, it is not open for discussion or consideration upon the present writ of error; (3) Because irrespective of the special statute of New Mexico aforesaid, the answer of the defendant below was sufficient at common law to let in this evidence, and to authorize and require the courts to consider and give effect to said statutes.

(1) *The New Mexico Statute.*

By the Act of Feb. 7th, 1889, (Law of N. M., 1889, chap. 26), the New Mexico Legislative Assembly, provided, as follows:

(p. 45) "Section 1. The forms of pleadings which follow shall be sufficient in actions of law, and like forms may be used with such modifications as may be necessary to meet the facts of the case; * * *."

(p. 46) "*Commencements of Declarations.* A. B. by S. T., his attorney, sues C. D. (Here state cause of action.)"

* * * * *

(p. 49) "27th. That the defendant converted to his own use, * * * the plaintiff's goods, that is to say, etc."

* * * * *

(p. 51) *Commencement of Pleas.*

"37th. The defendant, by S. T., his attorney, says—(here state the substance of the plea)."

* * * * *

(p. 52) "53rd. That he is not guilty of the wrong alleged."

By reference to the declaration of the plaintiff and the answer of the defendant appearing in this record, (pp. 3. 5), it will be apparent that the plaintiff in error elected to model its declaration upon this statute, although, except for such statute, said declaration would have been wholly insufficient to tender any issue or present anything for trial herein. The plaintiff having chosen to proceed under the statute, the defendant, in drawing its answer, also pleaded in the form provided for in the same statute. As this statute solemnly enacted that the form of declaration adopted by the plaintiff below should *be sufficient*, the defendant could not attack it, although it afforded no definite information as to what was the precise case defendant would be required to meet, or what issues the plaintiff would present, or what evidence it would offer. By express provision of the statute the plaintiff under this declaration could raise any issue and introduce any evidence that could be introduced under any common law form of declaration in an action of trover and conversion. In like manner, the answer of the defendant being in the exact language which this statute declares should *be sufficient*, it was entitled to make

any defense and introduce any evidence which it could have made or introduced in any or all of the general or special common law pleas in such action. As this action was modelled upon and authorized by a special statute, the plaintiff in error is hardly in a position to insist that the common law rules of pleading in actions of trover and conversion have any applicability whatever.

If the plaintiff below had intended or desired that the pleadings in this action should be considered and controlled by common law rules, then it should have filed a common law declaration; for the statutory procedure was not exclusive. In that event the defendant would undoubtedly have modelled its plea in accordance with common law rules. The plaintiff below, having elected to proceed under the statute and in total disregard of the common law rules of pleading, cannot now be heard to complain that the defendant pleaded in accordance with the statute and did not model its defensive pleadings upon the common law forms of procedure in such cases. We say, therefore, that no attack can now be made upon the pleadings herein, because the defendant proceeded in that respect in strict accordance with the special statute of New Mexico, which guaranteed to it that a pleading in the form here adopted should be sufficient.

(2) *The form and sufficiency of the pleadings not an open question.*

The sufficiency of these pleadings was necessarily involved in the first trial and review, and their sufficiency was necessarily, although not ex-

pressly, settled by the former decision. (*D. &c. R. Co.* v. *U. S.*, 9 N. M., 382, 386.) As no contention was made upon the first trial and writ of error as to the insufficiency of these pleadings and no attempt made by the plaintiff in error to review that judgment of the New Mexico Supreme Court, the question was by the decision on that review concluded and eliminated from the case in all its future stages.

In *2 Van Fleet's Former Adjudication* (1895), 1321-2, we find the following:

> "§ 680. If the judgment rendered on appeal could not have been reached without deciding a question, that question remains settled during all subsequent stages of the proceedings. It is said in Kansas that the decision of the Supreme Court becomes 'the law of the case; and this rule embraces not merely all questions presented but also all questions necessarily involved in the decision.' Thus if the case is dismissed on the merits and on appeal reversed on the facts *without any discussion of the sufficiency of the petition, this bars any questions concerning its sufficiency on the second appeal.*"

In *Davis* v. *McCorkle*, 14 Bush (Ky), 746, on a first appeal the sufficiency of the petition was not attacked, but on the second appeal the defendant attacked its sufficiency *ab initio*. The Court said (p. 752-4):

"This Court, however, without adverting to the question of the sufficiency of the petition reversed the judgment and remanded the case with certain specific directions to the court below for 'further proceedings consistent with the opinion.'

* * * *

If the plaintiff's petition was defective as now contended it was not only unnecessary but improper to consider these questions of fact, or to reverse the judgment.

* * * *

If the petition showed on its face that no cause of action existed that was an objection which presented itself directly in the way as a reason why the plaintiffs were not entitled to a reversal of the judgment dismissing the petition, and must be deemed equal to an express decision that the petition was sufficient. (Citations.)

That the present appellants were appellees on the former appeal and failed to present to the Court the grounds now urged, does not affect the question. It was as much their interest and duty to present the grounds and reason on which that judgment could be affirmed as it is now to present grounds and reasons upon which the judgment may be reversed; they were as much bound to present then all available grounds for an affirmance as they are to present now all available grounds for a reversal. The question

as to the sufficiency of the petition was presented in the record then and if the ground assumed by counsel be tenable, an affirmance might have been secured and upon the identical ground upon which a reversal is now asked.

The duty of parties in courts of original jurisdiction is thus correctly stated in *Henderson* v. *Henderson*, 3 Hare, 115: 'Where a given matter becomes the subject of litigation and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

The learned court speak of the parties, both plaintiff and defendant, and add, 'A party can no more split up defenses

than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction.'

This duty of the parties in presenting their complaint and defense in the courts of original jurisdiction is in appellate courts devolved on counsel, and no reason is perceived which will allow an appellee to omit an available defect in his adversary's case as ground for affirmance, and afterward to urge that same defect as ground for reversing a judgment against him, which could not equally allow an appellant who had on first appeal overlooked some fatal error to prosecute a second appeal. This would render litigation in appellate courts practically interminable.

Reason and authority alike demand that if on a first appeal there is a question in the record which, if decided in favor of the appellee, would entitle him to an affirmance of the judgment in his favor, it is his duty to present it to the court, when it will become the duty of the court to decide it, and if the appellee fails to present the question, or the court fails to decide it, and reverses the judgment, on a subsequent appeal, that question must be treated as having been decided adversely to the appellee in the first case, whether he be the appellant or the appellee on the subsequent appeal."

See, also, *Henderson* v. *Henderson*, 3 Hare, 100, 115, and note 1, pp. 114-15 of Smith's Ann. Ed. of 3, Hare's reports.

In *Breadalbane* v. *Chandos* 2 M. & C., 711, Lord Cottenham said (p. 732):

> "It is certainly contrary to the practice in this court to assume jurisdiction in favor of parties who, having had an opportunity of asserting their title in another court, where the matter had been the subject of adjudication, have either missed that opportunity or have not thought proper to bring their title forward."

Upon these authorities, we respectfully contend that the sufficiency of the defendant's plea or answer herein was settled by the first decision of the N. M. Supreme Court, and is not now open for consideration upon this review of the second judgment rendered by said territorial supreme court.

(3) *The defendant's plea or answer herein sufficient at common law.*

We submit that, irrespective of the operation and effect of the New Mexico Act above quoted, the plea or answer of the defendant herein was at common law appropriate, regular and sufficient to entitle defendant to raise all the issues and introduce all the evidence which were presented by it in the case at bar.

In *2 Greenleaf on Evidence* (16th ed.), 96, we find the following:

> "§ 648. The defense to this action (trover) in the United States, when it

> does not consist of matters of law, is almost universally made under a plea of 'not guilty'; a special plea in trover being as seldom seen here as it was in England under the old rules of practice. * * * In this country, as formerly in England, this plea put the whole declaration in issue. Under it, therefore, the defendant may prove by any competent evidence, * * facts showing a license, etc. It has been said that release is the only special plea in trover, etc."

In *Nichols* v. *Minn. &c. Mfg Co.*, 70 Minn., 528, the answer was a *general denial*, and the Court *held*:

> "In an action of trover the plaintiff alleged generally that the defendant had converted the property to his own use without stating in what way he converted it. *Held*, under a general denial in the answer the defendant may prove any state of facts which show that he has not converted it."

And at page 530 the Court said:

> "It is assigned as error that the court permitted the defendant to prove a certain South Dakota statute against the objection that it was not pleaded in the answer, which statute, as the courts of that state have construed it, provides that a chattel mortgage shall not pass the title to the property covered by it until foreclosure, but that it shall confer on the mortgagee

merely a lien as security for the payment of the indebtedness. We are of opinion that the evidence was competent, if material. The plaintiff did not allege the manner in which the defendant converted the property, and under its complaint might have proved that the defendant converted it any one of several different ways. * * * The defendant was not obliged to anticipate the proof in the answer, but had a right to meet it with any evidence which showed that it was not guilty of converting the mortgaged property. (Citations)."

In *Johnson* v. *Williams*, 48 Vermont, 565, the defendant pleaded the general issue, and the case turned upon certain proceedings before a justice's court which, it was contended, could not be admitted in evidence because not specially pleaded. The Court said (p. 570):

"The action is trover. The *conversion* of the property by the defendant is the *gist* of the action. The plea of not guilty put in issue the conversion and the lawfulness of it. Under this plea alone, probably, but certainly in connection with the notice, the defendant would have a right to show that he had not converted the plaintiff's property to his own use, but that what he had done about the same, he had done under a legal process and lawfully. The legal effect of the record of the proceedings be-

fore the justice court, admitted under the general issue and notice, is, to show that the defendant had not unlawfully converted the plaintiff's property to his own use, etc."

In *Wallace* v. *Robb*, 37 Iowa, 192, it was held:

"Where in an action for trespass for taking personal property, the defendant answers denying the taking and the allegations of the petition generally, he may thereunder produce evidence showing that the property was taken by him with the assent of the plaintiff."

And the Court said (p. 194):

"In the first place plaintiff's counsel insists that the only issue in the case was the taking and holding the possession of the property by defendants; that defendants deny they took the property and they will not, therefore, be permitted to show a justification for taking.

The defendants deny generally the allegations of the petition, and then set up a state of facts which amounts to a defense to the action. The purport of the special defense is that defendants did not take possession of the property. Now, the petition claims to recover on the ground that defendants wrongfully seized the property and retained possession thereof. If defendants showed that they took and held the property under an agreement

> with, and by the consent of plaintiff, it was certainly a defense *proper to be introduced under defendants' general denial*, for it would establish that defendants did not wrongfully take and hold the property, and this is the very burden of the issue."

Upon the strength of these authorities and many others similar, which might be cited, we confidently contend that defendant's answer herein was at common law sufficient to make admissible all the evidence to which plaintiff objected at the trial.

III.

Burden of Proof.

Another contention, urged by the eminent counsel for plaintiff in error upon the New Mexico Supreme Court on the second review in this case, was that the burden was upon the defendant in error to establish affirmatively that it had not been guilty of any "wrongful conversion" of the timber which is the subject of this action. His contention was that, even conceding that the Act of Congress granted to the railroad company the right to take timber from the public lands for the purposes specified in the said Act, and conceding further that this timber was taken from the public lands by The New Mexico Lumber Company upon written authority from the defendant in error which expressly limited the lumber company to taking timber for the purposes expressly permitted by said statute, the defendant must nevertheless

go further and establish clearly and affirmatively that it made *no wrongful misuse* or misapplication of the timber which it had a right to take for the specified purposes,and which was actually taken for those purposes.

Passing over for the present certain radical and, as we believe, fatal insufficiencies in the proof introduced on behalf of the plaintiff below, and the entire sufficiency of the defense affirmatively established by the defendant below, we respectfully, but most confidently, submit that the rule of law as to the burden of proof is not as was contended by counsel for the plaintiff in error in the New Mexico Supreme Court, but, on the contrary, that the burden was on the plaintiff below to establish affirmatively *a wrongful conversion* by the defendant.

The declaration herein is in the most general terms, not even charging any wrongdoing in intent or act; and under it the plaintiff below was by statute permitted to introduce any proof which would tend to establish an unlawful conversion of this lumber. The declaration, although it does not say so, yet must in law be interpreted as charging a *wrongful* conversion of this property, and the N. M. Court upon the former review correctly decided that "the sole issue presented is, has a wrongful conversion been committed? *D. & R. G. v. U. S.*, 9 N. M., 382, 386.

The burden of proving this was on the United States, and in order to sustain that burden it must prove that the defendant in error entered upon these public lands without authority, or that having entered thereon with due authority, it exceeded

the limits of its authority in taking timber, or that having taken it for the specified purpose, it was illegally misused or misapplied to some other purpose not authorized by the statute.

Until a plaintiff has, by some legally sufficient evidence, affirmatively attached the element of wrongfulness to the alleged act of a defendant, the latter is protected by the invariable presumption of law that assumes, until the contrary is affirmatively shown, that a party has acted with entire rectitude and within his legal rights.

That the burden of proof in actions of trover is as we have stated above, can, if questioned, be demonstrated by reference to old English cases of the period when or soon after that form of action first came into general use.

In *Cooper* v. *Chitty*, 1 Burrows, 20, 31, Lord Mansfield said, after stating the case:

> "It is an action of trover. * * * In *form* it is a fiction, in *substance*, a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use. The form supposes the defendant *may* have come lawfully in possession of the goods. * * *
>
> This is an action of tort, and the whole tort consists in the *wrongful conversion*.
>
> Two things are necessary to be proven to entitle plaintiff to recover in this kind of action: 1st, Property in the plaintiff; 2dly, A wrongful *conversion* by the defendant."

[Note the very suggestive italics in the above quotation, which are not ours, but those used in the decision itself.]

In *Keyworth* v. *Hill*, 3 B. & A., 6, 687, it is said:

> "The action is founded on the *wrongful act* of the defendant."

In *Burroughs* v. *Bayne*, 5 Hurls. & N., 296, Martin, B., said (302), and the other members of the court agreed with him:

> "I, myself, have always understood that trover was the action whereby the person *entitled to the possession* of goods *wrongfully* detained from him was entitled by law to recover for their detention. I do not think that there is any necessity to discuss the original meaning of the words 'trover' or 'conversion'; they are technical expressions used in an action given by the law to enable a man to recover damages for the *unlawful* detention of his property. I freely admit that the word 'conversion' is an unfortunate expression. * * * In ordinary cases the plaintiff's proof is much the same as would be required in an actio n of detinue.

In *Pillott* v. *Wilkinson*, 2 Hurls. & C., 72, the same court said (82-3):

> "The term 'conversion' has, in truth, a technical and conventional meaning, which was originally given to it in order, etc.

* * * * By long practice it has been established that where a person withholds from another his goods *without lawful reason or excuse*, the action of trover lies."

Blackstone, in his comment upon the action of trover, says:

"A conversion must be fully proved."

In *1 Greenleaf on Evidence* (16th ed.), 148, the general rule is stated as follows:

"§ 74. *In general.* The third rule which governs in the production of evidence is, that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.

(p. 152) "§ 78. *Sundry instances.* To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case; as for example, etc."

(p. 154) "§ 80. *Sundry instances.* Where the negative allegation involves, * * * the wrongful violation of actual lawful

possession of property; *the party making the allegation* must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In *6 Wait's Actions and Defenses* (1879), we find the following:

(p. 44) "§ 2. Acts done under authority of law are not trespass."

(p. 70) "§ 8. It is a rule that if one enters another's premises by authority of law and commits an unjustifiable act, he will be deemed a trespasser *ab initio*, but if the entry be *by authority of the owner*, the wrong-doer can only be punished for the abuse.

"§ 9. When personal property is on another's lands with his permission and in pursuance of a contract, he cannot lawfully prevent the owner of the property from removing it. If, therefore, standing timber is sold and left on the land by the purchaser after being cut, or any personal property bought and left thereon, the buyer has a right to go upon the land and take it away."

(p. 129) "§ 1. Trover is a special action on the case in favor of any person who has a general or special property in goods, against any person who *wrongfully* withholds them from his possession."

(p. 129) "§ 2. Trover is a proper remedy whenever a person has goods or property in his possession belonging to another, which he *wrongfully* detains from such owners' possession, or from the possession of a person who is entitled thereto. (Citations.) A *wrongful* conversion is *the gist* of the action; and whenever that can be established and the plaintiff maintains his right to the immediate possession of the property, the action will lie."

(p. 142) "§ 5. No person is chargeable in trover for property in his possession belonging to another, unless he holds it *wrongfully*, and against the right of the owner. In order to maintain this action *the plaintiff must show* that the defendant not only has the property in his possession, but, also, that he has *wrongfully* converted it. Therefore it follows that, whenever a person has a justifiable cause for withholding the property, the action will not lie."

(p. 163) "§ 1. In order to maintain an action of trover, *the plaintiff must show* that the defendant has converted the property, otherwise there can be no recovery. Indeed, conversion *of a wrongful character* is the gist of the action."

(p. 221) "Sec. 8. If the plaintiff relies upon his property in the goods converted, the burden is upon him to show property in himself. * * He is also bound to

prove that the property sued for has some value, and what that value is; also that the defendant took or detained the property *without right*, etc. * * * If the defendant has color of title, the plaintiff must show title as well as possession."

In *Burnham* v. *Noyes*, 125 Mass., 85, it was held:

"On the issue whether the conversion of personal property was fraudulent so that an action therefor would not be barred by a discharge in bankruptcy of the defendant, the burden of proving the fraud is on the plaintiff throughout the case; and an instruction that, if the defendant did any acts in relation to the property which were unlawful, the burden was on him to prove that he acted honestly, is erroneous."

In *Rast* v. *Dillon*, 27 S. W., 497, it was held:

"Where in an action for the conversion of a note, the plaintiff alleges that after the note was given to defendant to secure him as an endorser on another note, plaintiff purchased the note, and defendant promised to deliver it to him when the other note was paid, the payment of the other note is a condition precedent to the right of plaintiff to recover, and the burden of proving the same is on him."

In *Waring* v. *Penn. R. Co.*, 76 Pa. St., 491, 496, it is said:

"Lord Mansfield defines the action of trover to be 'a remedy to recover the value

of personal chattels wrongfully converted by another to his own use.' The taking may have been lawful, hence the gist of the action lies in the wrongful conversion. Where one has the lawful possession of the goods of another, and has not converted them, this action will not lie until there has been a refusal to deliver them upon demand made. Ordinarily where such goods have been converted by the bailee, the law presumes it to be wrongful, and the action may be brought without a previous demand; but such presumption may be rebutted, showing a permission from the plaintiff to convert the property."

In this case it may be noted that the defendant pleaded "not guilty," simply.

In *1 Chitty on Pleadings* (16th Am. Edition), the author says:

(p. 165) "The form supposes that the defendant might have come lawfully by it (the property), and if he did not, yet by bringing this action the plaintiff waives the trespass. No damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2dly, a *wrongful* conversion by the defendant."

(p. 172). "With respect to the *nature of the injury*, we have already seen that a con-

version is essential to support this action.

It may not be altogether foreign to our present inquiry to give some general account of the different instances of conversion. They may be either, 1st, by *wrongfully* taking a personal chattel; 2dly, by some other *illegal* assumption of ownership, or by *illegally* using or misusing goods; or, 3dly, by a *wrongful* detention."

In *I Addison on Torts* (Wood's ed., 1878), it is said:

(p. 554) "§ 532. To enable a plaintiff to maintain an action and recover damages for a seizure or conversion of chattels, he must show *that the seizure was wrongful*, and that he has been damnified by it. He must, therefore, give some general evidence of his right to the chattel, *and of the wrong* done to him by the defendant in taking it away."

(p. 556). "§ 535. It is *necessary for the plaintiff*, in an action for the conversion of chattels, *to prove* either that the defendant *unlawfully* meddled with the plaintiff's goods, and removed them from some place where they had been deposited by the plaintiff, and that the goods had since been lost to the plaintiff, or that the chattels came to the hands of the defendant wrongfully, or by a tortious taking, or that the defendant has *unlawfully* exercised dominion over

them, to the prejudice of the plaintiff, or that there had been a wrongful destruction of the chattels."

The amount of affirmative evidence which the plaintiff must introduce to make out a *prima facie* case of "wrongful conversions" may differ in different cases; but in *all* cases he must establish the *wrongfulness* of the conversion, before he is entitled to recover or to put the defendant upon proof. Sometimes the circumstances of a particular case may be such that very slight proof on the part of the plaintiff may be sufficient, and there are even instances in which the mere proof of the taking or the detention necessarily discloses *such a condition of facts* as is sufficient to outweigh the presumption of innocence and lawfulness and to make out a *prima facie* case of wrongful conversion; but even in such cases the burden of proof is shifted to the defendant, not because the plaintiff is relieved of showing the wrongfulness of the alleged conversion, but because the evidence, which the plaintiff has produced to show the taking or the detention of the property, is of such a character that it is at the same time evidence, either direct or by legitimate inference, of the further fact that the taking or the detention was "wrongful."

We think, therefore, that we are justified in saying that we believe that there is no well considered case which, when thus analyzed, legitimately supports the contention that when the plaintiff merely shows that the defendant has property which was once plaintiff's, the latter has with-

out further proof of the wrongfulness of the defendant's possession made out a *prima facie* case sufficient to put the defendant upon his defense.

Moreover, the learned counsel confused the burden of proof as to the existence or *acquisition of a right*, with the burden of proof as to the lawful and proper *exercise of that right*. Some authorities do hold in cases which have arisen under somewhat similar statutes that the burden of establishing a special or unusual grant, right, license or privilege is upon the party asserting such right, license or privilege. But the authorities with equal unanimity hold, either directly or by logical and necessary implication, that *when the right or license is established* by the evidence, then the presumption of law is that the right has been *properly and legitimately exercised*, and that the burden of proof is on the party asserting the contrary.

A single instance of what we mean will be sufficient.

In *U. S.* v. *Reder*, 69 Fed., 965, the grant or license from the government to cut timber on the public lands having been established the Court says that the burden was on the United States

> "to satisfy the jury by the evidence beyond a reasonable doubt that the defendant did *cut timber* * * * from the public land of the United States *for purposes other than those 'contemplated by the statute'*."

So, also, we say in this case, that the law is properly laid down by N. M. Courts in the case at bar, that when the railroad company had *established*

its right, under a solemn grant from the government, to cut timber upon the public lands, then the burden is on the plaintiff in error to establish that the railroad company *exercised a legal right in an unlawful manner*. After repeated, careful and an extensive examination of the authorities, we have found but a single case which fairly and clearly announces the opposite docrine, to wit: *U. S.* v. *D. & R. G.*, 31 Fed., 889. But the decision of Judge Hallett in that case, so far as regards that part of it, was disapproved and reversed by the Circuit Court in *D. & R. G.* v. *U. S.*, 34 Fed., 838, which latter decision was affirmed by the Supreme Court of the United States in *Same* v. *Same*, 150 U. S., 1.

The defendant below established by the evidence that it was the grantee and beneficiary of the Acts of Congress approved June 8, 1872, and March 1, 1877. It further established that within the time fixed for those Acts it had constructed 1130 miles of its railway lines, as to which it was entitled to the benefit of the rights and privileges granted by said Acts. It further established that the lands described in the declaration were adjacent to its said railway lines within an extreme limit of three miles from said lines; also that the timber received by it was taken and received for railroad purposes.

(See agreed statement of facts, Rec., fol. 32-4, and defendant's exhibits "A", "B", "C" and "D").

When analyzed and reduced to its ultimate effect the contention by the plaintiff in error in this case upon the subject of the burden of proof is that, even if it be conceded that the railroad com-

pany had a *right*, under the Acts of Congress aforesaid, to take and use this property for the purposes specified in the Congressional grant, and even if it be further conceded that the railroad company actually did take and receive such material *for the purposes contemplated* by the statute, the burden of proof was nevertheless upon the defendant to go still further and show exactly *how and where* it used each piece of this timber, in order to establish clearly and affirmatively that it had not "misused or misapplied" any of it to some purpose not contemplated by the Act of Congress.

We confidently submit that such is not the law. *The right* of the railroad company to take timber being clearly established, and the fact being further shown that it took the timber for *the purposes mentioned in the statute*, and did not confer upon The New Mexico Lumber Company any right to take timber from the public lands for any other purpose, the presumption arises that the railroad company properly and rightfully *used* the timber, which it rightfully received, and if the plaintiff below relied upon the fact that the defendant below had been guilty of conversion by reason of a misuse of this timber, the burden was upon the plaintiff to show that fact.

IV.

Adjacency.

Another point that was raised by the plaintiff in error upon its assignment of errors in the New Mexico Supreme Court (Rec., fol. 41, Assignment 13th), was that the lands described in the declara-

tion were not adjacent to the line of the defendant's railroad constructed prior to June 8, 1882. The record herein shows (fol. 33):

> "3. That the railroad lines constructed prior to June 8, 1882, extended through a portion of the lands described in the plaintiff's declaration in this cause and for a distance of more than one hundred miles west and four hundred miles east and north of said lands."

And also (fol. 34):

> "6. That all of said 2,100,000 feet of lumber so received by the defendant railroad company was cut from trees standing within a maximum distance of three miles from the main line of the defendant railroad company; that about one-third of the whole amount was cut within one mile of said railroad line, one-third at a distance of more than one mile, but not exceeding two miles, and the remaining one-third at a distance of more than two miles, but not exceeding three miles from said railroad line."

The mere statement of the admitted facts in relation to the situation of these lands relative to the road of the defendant in error constructed under the Act of June 8, 1872—especially when viewed in the light of the decisions to which attention has already been called—is a complete and irrefutable demonstration that said lands were "adjacent" to the defendant's lines within the contem-

plation of said Act of Congress, and that the New Mexico Supreme Court correctly held that the contention of the plaintiff in error to the contrary was untenable.

V.

Issues and Facts Involved in the Case at Bar.

In the foregoing discussion we have covered, we think, all the contentions of law which appear in the assignment of errors made by the plaintiff in error in the Supreme Court of New Mexico, and which, for want of any other or better information upon the subject, we assume will be, or at least may be, urged upon the present writ of error.

Having now sufficiently and, as we believe, fully presented the propositions of law by which this case is to be determined by this Honorable Court, it is material, or certainly seems appropriate, to consider briefly the issues and facts of this particular case to which that law is to be applied.

(1) *The Pleadings on behalf of the plaintiff.*

The pleadings filed by the plaintiff below consist of the declaration (Rec., fol. 5), and a general replication (fol. 9).

A consideration of the declaration discloses two particulars in which it fails to contain allegations which are *ordinarily deemed essential* for a legally sufficient declaration in an action of trover, to wit:

(a) *Wrongful conversion* by the defendant.

This declaration wholly omits to charge, either directly or inferentially, by a statement of facts out

of which wrongful conversion can be legally implied, that the defendant is chargeable with any "wrongfulness" in its alleged action relative to this property. It must, and doubtless will, be contended that the omission of this element from the declaration is excused and rendered unnecessary by the New Mexico Act, above referred to, and with this contention we are not disposed to take issue.

(b) *Property* in the plaintiff.

The first essential, both of pleading and proof, on the part of the plaintiff in an action of trover is that he shall allege and prove "property" in the chattels sued for by showing that he had possession, or an immediate right of possession, of said chattels *at the time of the alleged conversion.* This declaration, however, does not contain such an allegation. It only alleges that the goods, which the defendant is accused of converting to its own use, consisted of "logs, lumber and timber manufactured out of trees theretofore standing or growing upon certain lands of the plaintiff," etc.

An allegation that said trees "*theretofore*,"—that is, at some indefinite time previous to the alleged conversion,—stood upon certain lands of the plaintiff is, we submit, not a sufficient allegation that the plaintiff had, at the time of the alleged conversion of these goods by the defendant, the possession of, or the immediate right of possession of, said property. It is evident from this allegation that the plaintiff based its right upon the fact that said trees were "theretofore"

standing or growing upon certain lands of the plaintiff, but there is no allegation either that the defendant took these trees from said lands while the plaintiff was the owner of the land, or that at the time the trees were taken they were the property of the plaintiff; nor is there anything in the declaration, we think, which *necessarily* amounts to an allegation of such facts.

We submit, therefore, that the application of well-recognized principles of law shows that this declaration does not sufficiently allege *plaintiff's title* to these trees at the time that the lumber manufactured therefrom is said to have been converted by the defendant. We think that the defendant in error might, if it chose to do so, safely rely on the fact that the declaration herein does not state a cause of action against it, and was therefore wholly insufficient to support any judgment in favor of plaintiff in error.

(2) *Plaintiff's Evidence.*

By reference to the agreed statement of facts, (Rec., fol. 30), it is apparent that the plaintiff below at the trial established only three material facts, to wit: (a) That the lumber which the railroad company received was cut from the lands described in the declaration; (b), that *prior* to the time of said cutting said lands were public lands of the United States; and (c), the value of said timber.

Upon applying to this evidence the principles of law laid down by Lord Mansfield in *Cooper* v. *Chitty*, *supra*, and, as we contend, obtaining ever

since, it will be seen that it fails to establish either of the fundamental facts which are essential to make out a case in favor of the plaintiff, to wit: (1) *property* in the plaintiff *at the time of the alleged conversion*; and (2) *wrongful conversion* by the defendant.

On the one hand, there is no attempt in this evidence to establish affirmatively, either by direct evidence, or by necessary or legal inference from the evidence introduced, that the railroad company *wrongfully* received or used this timber.

On the other hand, this evidence is insufficient to show *title* in the plaintiff *at the time of the alleged conversion.* The mere fact that at some indefinite time, "*prior* to the time of said cutting, said lands were public lands of the United States," is not sufficient evidence that the United States was the owner of these lands at the time the trees were cut or at the time the railroad company received this lumber, or that the plaintiff then had a *present* right to the possession of either the lumber or the lands.

We therefore think that if the railroad company had, when plaintiff rested its case, (Rec., p. 9), interposed a motion for a nonsuit, or a demurrer to the evidence, the trial court would have been required by law to sustain the same and to hold that the plaintiff had not made out a case.

(3) *Defendant's evidence.*

The defendant, however, did not choose to rest upon its technical rights arising out of the aforesaid insufficiencies of the plaintiff's pleadings and proof, but, secure in the consciousness that it had acted strictly in accordance with the rights

solemnly granted to it by Congress for the valuable consideration of the benefits which the construction and operation of its road had conferred and was conferring upon the country and its people, it preferred to put in its defense upon the merits. It introduced in evidence, (1) the Acts of Congress aforesaid, showing its *right* to take timber from these public lands, if they were public lands at that time; (2) its appointment of The New Mexico Lumber Company; and (3) its orders upon that company for lumber, showing that in its dealings with such lumber company it had only authorized and had expressly limited said company to taking timber from the public lands in the localities and for the purposes *specified in said acts.* It further showed the extent of its road constructed under said Act of Congress, to wit: 1130 miles; and the further fact that this portion of its road extended through the lands in question, and for from 100 to 400 miles beyond on either side thereof. It further showed the maximum distance from the line of its road of any and all of the lands from which timber was taken, to wit, within a three mile limit.

The evidence thus produced by the defendant, we submit, was ample to establish a perfect defense to this action, even if it could be held that plaintiff had made out a *prima facie* case, and that the burden of proof was shifted to the defendant to establish its right from the government to take timber and that it had taken timber only in accordance with the terms of the grant. Hence the trial court could not do otherwise than give judg-

ment in favor of the defendant and the territorial Supreme Court was, by the law and the facts, bound to affirm that judgment.

It should be borne in mind that, while the congressional grant here under consideration is a special statute, it is a *public*, rather than a private grant. A railroad company is a *quasi* public corporation. While the ultimate ownership of the tangible property of the railroad company is in private parties or persons, the railroad company exists and operates entirely in the interests of the public; and but for the essential benefit and public utility which the community at large receives therefrom railroads would not be permitted to exist. Therefore, this grant can not be said to be a private grant to a private individual for his sole benefit, but it is, though special, *a public grant*, and, as will be seen by the Federal cases already repeatedly referred to, the courts in interpreting and giving effect to this statute are governed more nearly by the rules of construction applicable to general statutes rather than those by which special private grants or licenses are given. Accordingly we find the courts always holding that while they are authorized to, and usually do, exercise a greater or less amount, according to the particular case, of strictness in construing such statutes for the purpose of ascertaining *the right* which Congress intended to give, yet, when it has been ascertained and determined that Congress intended to grant a right and a substantial benefit and that the party comes within the class to which the right or benefit is intended to be given, then such statute must

receive *a liberal construction* for the purpose of *carrying into effect the beneficent intention* of Congress. The rule in this respect is aptly and fully stated in the *Bacheldor* case, *supra*, and is also expressly mentioned with more or less prominence in many others of the Federal cases above referred to.

VI.

Rulings Upon Evidence and Instructions.

The assignment of errors in the New Mexico Supreme Court included assignments predicated upon the admission of evidence on behalf of the defendant and the giving and refusal of instructions, but, as these assignments were not seriously urged in the court below, we presume they will not be seriously urged here, for the propositions of law which have been fully discussed in the preceding portions of this brief show that the rulings of the trial court upon the admission of evidence and upon instructions were entirely correct and that the judgment of affirmance by the New Mexico Supreme Court upholding those rulings and affirming the judgment of the court below, was correct both in law and upon the facts. No good, therefore, seems to be accomplished by extended discussion, at this time, of these rulings separately, and, therefore, we will merely refer to the foregoing discussion in relation to the Acts of Congress aforesaid and to the "burden of proof," as necessarily involving and sufficiently supporting our contention that, so far as concerns these points,

the judgment of the court below was correct and should be affirmed.

We respectfully submit that there was no error in the judgment of the New Mexico Supreme Court to which this writ has been sued out, and that said judgment should be affirmed.

Very respectfully,

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